Labtec Sdn Bhd v Resilient Construction Sdn Bhd (Syarikat Telekom Malaysia Bhd, third party; Perangsang Aluminium Sdn Bhd, intervener)

HIGH COURT (KUALA LUMPUR) — SUIT NO S7-22(23)-553-88
LIM BENG CHOON J
17 AUGUST 1992

Civil Procedure *— Execution — Garnishee proceedings — Mareva injunction against judgment debtor restraining judgment debtor from disposing of or dealing with moneys due and/or owing to judgment debtor by garnishee — Whether garnishee order absolute may be made — Rules of the High Court 1980 O 49 rr 1 & 2*

Civil Procedure *— Execution — Enforcement of judgment against company — Effect on enforcement proceedings of winding-up petition against company — Companies Act 1965 s 224*

Civil Procedure *— Execution — Garnishee proceedings — Garnishee order absolute made on application of judgment creditor — Other judgment creditors obtaining similar orders — Whether rateable distribution should be ordered — Rules of the High Court 1980 O 49 r 6 & O 51A*

A judgment creditor obtained a garnishee order absolute against the garnishee dated 27 August 1990 to satisfy a judgment debt owing by the judgment debtor. At the material time, there was in existence a Mareva injunction restraining the judgment debtor from disposing of or dealing with any moneys due and/or owing to the judgment debtor from the garnishee. At the time that the garnishee order was made absolute, there was a winding-up petition pending against the judgment debtor. Also, at that time there were several other creditors of the judgment debtor who had already obtained garnishee orders absolute against the garnishee. The garnishee appealed to the judge-in-chambers against the decision of the senior assistant registrar granting the garnishee order absolute dated 27 August 1990. Three grounds of appeal were raised. They were:

(1) that the grant of the garnishee order absolute was in violation of the mareva injunction and therefore the senior assistant registrar had no jurisdiction to grant such an order;
(2) that as there was a winding-up petition pending at the time that the order was granted, the senior assistant registrar had acted in violation of s 224 of the Companies Act 1965 ('the Act'); and
(3) that the order was issued contrary to O 49 r 6(1) read with O 51A of the Rules of the High Court 1980 ('the Rules') as there were at the material time six other creditors of the judgment debtor who had already been issued with garnishee orders absolute and therefore there should be rateable distribution of the moneys due to the judgment debtor amongst the several creditors.

The winding-up petition was filed on 31 March 1990 but was set aside by the court on 10 December 1990.

Held, dismissing the appeal:

(1) The Mareva injunction merely restrained the judgment debtor from disposing of or dealing with any moneys received and/or due and owing to the defendant from the garnishee. It did not prevent the judgment creditor from resorting to O 49 r 1 of the Rules to garnish the amount of the debts due to the judgment debtor from the garnishee. By O 49 r 2 of the Rules there can be no dispute that upon the issue and the service of the order to show cause on the garnishee, the attachment of the property of the judgment debtor has been effected and the garnishee is asked to appear only to show cause as to why he should not release the debt to the judgment creditor.

(2) An attachment put into force after the commencement of winding-up is void pursuant to s 224 of the Act. If the attachment is effected before the commencement of the winding-up, the attachment cannot be affected by s 224 of the Act. The setting aside of the winding-up petition was presented on 31 March 1990.

(3) Order 51A is not applicable to a garnishee proceeding simply because a garnishor can obtain a garnishee order against a garnishee if and only if the latter was in possession of funds due to the judgment debtor sufficient to satisfy the judgment debt of the judgment creditor. The question of rateable distribution therefore could not arise. Likewise, O 49 r 6 of the Rules was equally inapplicable to the present case since the other creditors had obtained garnishee orders absolute which would not have been issued if the garnishee was able to satisfy the court that there was no funds or no sufficient funds to satisfy the garnishee order. More importantly, there was no evidence to show that there was some person other than the six creditors mentioned earlier who could be said to be entitled to or who had made a claim in respect of the moneys of the judgment debtor held by the garnishee.

[Bahasa Malaysia summary

Seorang pemiutang penghakiman telah mendapat suatu perintah garnisan mutlak terhadap yang digarnis bertarikh 27 Ogos 1990 untuk memenuhi hutang penghakiman yang kena dibayar oleh penghutang penghakiman. Pada masa yang penting itu, terdapat suatu injunksi mareva yang menahan penghutang penghakiman daripada melupuskan atau berurusan dengan wang yang kena dibayar dan/atau yang terhutang kepada penghutang penghakiman oleh yang digarnis. Pada masa perintah garnisan itu dijadikan mutlak, terdapat suatu petisyen penggulungan yang masih belum selesai terhadap penghutang penghakiman. Juga, pada masa itu, terdapat beberapa orang pemiutang penghutang penghakiman yang lain yang telah mendapat perintah garnisan mutlak terhadap yang digarnis. Yang digarnis itu telah merayu

kepada hakim dalam kamar terhadap keputusan penolong kanan pendaftar memberi perintah garnisan mutlak bertarikh 27 Ogos 1990. Tiga alasan rayuan telah ditimbulkan. Mereka adalah:

(1) bahawa pemberian perintah garnisan mutlak itu mencabuli injunksi Mareva dan disebabkan itu penolong kanan pendaftar tidak mempunyai bidang kuasa untuk memberi perintah itu;
(2) bahawa kerana terdapat petisyen penggulungan yang masih belum selesai pada masa perintah itu diberi, penolong kanan pendaftar telah bertindak mencabuli s 224 Akta Syarikat 1965 ('Akta itu'); dan
(3) bahawa perintah yang dikeluarkan itu bertentangan dengan A 49 k 6(1) dibaca bersama A 51A Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah itu') kerana pada masa yang penting itu terdapat enam pemiutang penghutang penghakiman yang lain yang telah diberi perintah garnisan mutlak dan disebabkan itu sepatutnya terdapat pembahagian berkadar wang yang kena dibayar kepada penghutang penghakiman di antara beberapa pemiutang itu. Petisyen penggulungan itu telah difailkan pada 31 Mac 1990 tetapi telah diketepikan oleh mahkamah pada 10 Disember 1990.

Diputuskan, menolak rayuan itu:

(1) Injunksi Mareva itu hanya menahan penghutang penghakiman daripada melupuskan atau berurusan dengan wang yang diterima dan/atau yang kena dibayar dan yang terhutang kepada defendan oleh yang digarnis. Ianya tidak menghalang pemiutang penghakiman daripada menggunakan A 49 k 1 Kaedah itu untuk menggarnis amaun yang terhutang kepada penghutang penghakiman oleh yang digarnis itu. Mengikut A 49 k 2 Kaedah itu, tidak mungkin ada pertikaian bahawa setelah perintah menunjukkan kausa dikeluarkan dan disampaikan, kepada yang digarnis, penahanan harta penghutang penghakiman telah dilaksanakan dan yang digarnis itu telah diminta hadir hanya untuk menunjukkan kausa mengapa beliau tidak patut melepaskan hutang itu kepada penghutang penghakiman.
(2) Suatu penahanan yang berkuatkuasa selepas penggulungan dimulakan adalah tidak sah mengikut s 224 Akta itu. Jika penahanan itu dilaksanakan sebelum penggulungan dimulakan, penahanan itu tidak boleh dilaksanakan oleh s 224 Akta itu. Pengetepian petisyen penggulungan itu telah dikemukakan pada 31 Mac 1990.
(3) Aturan 51A tidak terpakai dalam prosiding garnisan kerana penggarnis boleh mendapat perintah garnisan terhadap seorang yang digarnis jika dan hanya jika yang kedua itu memiliki wang yang kena dibayar kepada penghutang penghakiman yang cukup untuk memenuhi hutang penghakiman pemiutang penghakiman itu. Dari itu soalan pembahagian berkadar tidak timbul. Begitu juga, A 49 k 6 Kaedah itu tidak terpakai dalam kes ini kerana pemiutang yang lain telah memperoleh perintah garnisan mutlak yang tidak

mungkin dikeluarkan jika yang digarnis itu berjaya memuaskan mahkamah bahawa tidak terdapat wang atau wang yang cukup untuk memenuhi perintah garnisan itu. Lebih penting lagi, tidak terdapat bukti untuk menunjukkan bahawa terdapat seseorang selain daripada enam orang pemiutang yang disebut dahulu, yang boleh dikatakan berhak atau yang telah membuat suatu tuntutan berhubungan dengan wang penghutang penghakiman yang dipegang oleh yang digarnis itu.]

Notes

For cases on garnishee proceedings, see 2 *Mallal's Digest* (4th Ed) paras 918–921.

Cases referred to

1 *Cretanor Maritime Co Ltd v Irish Marine Management Ltd; 'The Cretan Harmony'* [1978] 3 All ER 164; [1978] 1 WLR 966 (refd)
2 *PCW (Underwriting Agencies) Ltd v Dixon (PS)* [1983] 2 All ER 158; [1983] 2 Lloyd's Rep 197 (refd)
3 *Re Greer* [1895] 2 Ch 217 (follld)
4 *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd & Anor* [1992] 1 MLJ 571 (refd)
5 *Re Barrier Reef Finance & Land Pty Ltd* [1988] 6 ACLC 827; (1988) 13 ACLR 708 (follld)

Legislation referred to

Companies Act 1965 ss 223, 224
Rules of the High Court 1980 O 14, O 49 rr 1, 2, 6, O 51A
Rules of the High Court 1957 O 45 r 1
Companies Act [Eng & Wales] ss 227 (1), 228
Supreme Court Rules [Eng] O 45 r 1

KL Wong (*KL Wong & Co*) for the judgment creditor/plaintiff.
S Achan (*Tengku Mohamed Achan & Lim*) for the garnishee/third party.
Chia Loong Thye (*Skrine & Co*) for the intervenor.

Cur Adv Vult

Lim Beng Choon J: On 21 October 1988 Labtec Sdn Bhd ('Labtec') instituted this civil suit No S7–23–553–88 against Resilient Construction Sdn Bhd ('Resilient') claiming a sum of $477,042.71 which Labtec alleged was due to them for works done under a sub-contract ('the sub-contract') with Resilient which was the main contractor engaged by Jabatan Telekom to construct and complete a project known more specifically as the Erection and Completion of the Proposed Telecoms Equipment Block on Lot 1121, Jalan SS6/3 Sungei Way, Subang, Selangor for Jabatan Telekom ('the project'). On 4 June 1989, after Resilient had filed their defence, Labtec applied by way of summons-in-chambers (encl 6) for leave to enter final judgment under O 14 of the Rules of High Court 1980 ('RHC') against Resilient for the sum of $120,294.60 being part of the sum claimed under

A the statement of claim of Labtec and costs of $350 which application was duly allowed. Apparently there were some payments yet to be made by Jabatan Telekom to Resilient. Consequently, as Resilient failed to settle the judgment sum, Labtec filed a garnishee order to show cause against Jabatan Telekom directing the garnishee to pay the judgment creditor the sum of $124,144.60. For purpose of this and a subsequent second garnishee B proceedings, I shall where necessary refer to Labtec as the judgment creditor, Resilient as the judgment debtor and Jabatan Telekom as the garnishee. The said garnishee order to show cause was made absolute by the senior assistant registrar of the High Court ('SAR') on 15 March 1989 'subject to the lifting of an injunction order dated 20 November 1987 under Kuala C Lumpur High Court Civil Suit No S5–22–377–87'. Apparently the SAR felt that he had to insert the condition because he was notified by the garnishee that on 21 December 1987 they were served with an injunction order dated 20 November 1987 obtained by Markcon Sdn Bhd ('Markcon') against the judgment debtor. The injunction order was produced and marked as exh ST3 annexed to one of the affidavits of Sallehuddin bin Hj D Mohd Lip ('Sallehuddin'), the legal officer of the garnishee. The injunction was granted by NH Chan J in an order made by the learned judge on 20 November 1987 in an application made by Markcon as plaintiff in CS S5–22–377–87. Briefly put, the relevant part of the injunction restrained Resilient, as the defendant in that suit, whether by themselves, E their agents or servants or otherwise, from disposing off or dealing with any of the moneys received and/or due and owing to the defendant from Syarikat Telekom Malaysia to the said defendant under the main contract works. It was further ordered that the service of the order on Syarikat Telekom Malaysia Bhd would be sufficient notice to them of Markcon's claim to the moneys due from the former to the defendant. The defendant F was given liberty to discharge the order. It is appropriate to mention that the said injunction was never discharged.

The judgment creditor being dissatisfied with the proviso inserted in the garnishee order absolute of 15 March 1989 appealed to this court to cancel the proviso on the ground that the SAR was wrong in law to make the said G garnishee order absolute subject to the lifting of the aforementioned injunction. Their notice of appeal was filed on 17 March 1989. On 24 April 1989, counsel for the judgment creditor, apparently with the consent of the respective solicitors acting for the garnishee and the judgment debtor, applied to this court to have the aforesaid appeal of the judgment creditor transferred to Court Five for hearing of the appeal with suit No S5–22– H 237–87 by NH Chan J. I duly granted an order allowing the transfer on the same date.

On 19 April 1989 Labtec in this civil suit obtained another order from the SAR to enter final judgment against Resilient for the sum of $356,748.11 being the balance sum claimed under the statement of claim together with I interests thereon at the rate of 8%pa calculated from 21 October 1988 till date of full realization and costs of $350. As Resilient failed to settle the judgment sum and as there were some debts still due from Syarikat Telekom to Resilient, a second garnishee order to show cause was again obtained by Labtec against Syarikat Telekom on 18 May 1989. In addition to affidavit

evidence produced by the respective parties to the second garnishee proceeding, witnesses were called to give oral evidence at the said hearing before the SAR held on 16 August 1989. The purpose of calling the witness was to gather evidence to show exactly the total amount of money due to the judgment debtor but was still retained by the garnishee. I shall have more to say on this point presently. On 27 August 1990 the SAR made an order directing that the garnishee order nisi be made absolute and the garnishee was therefore ordered to pay the sum of $360,598.11 with interest at 8%pa to the judgment creditor. The garnishee thereafter filed a notice of appeal to this court against this decision of the SAR on 29 August 1990 (encl 49A).

On 12 March 1990 the garnishee received a letter from the liquidator of Markcon that a winding-up petition had been presented against Resilient to wind up the company and the garnishee was told that they should not pay any money due to Resilient or to pay to any party (see exh ST5 annexed to the affidavit of Sallehuddin of 11 September 1990 encl 52). In the same affidavit, Sallehuddin averred that other creditors of the judgment debtor had also obtained garnishee orders absolute against the garnishee and those other garnishee orders absolute were produced and marked as exhs ST6–ST10 annexed to the said affidavit. On my perusal of exhs ST6–ST10 the following garnishee orders absolute were granted to the following other creditors of the judgment debtor:

(1) Safeguards Security Protection Sdn Bhd on 15 March 1989 in CS 22 (23)–612–88 for the sum of $153,243.51 and costs;
(2) Zeta Letrik Sdn Bhd on 5 February 1990 in Sessions Court Summons 52–813–1989 for the sum of $75,226.26;
(3) Peninsula Development Sdn Bhd on 20 February 1990 in CS 23–3009–88 for the sum of $130,148.02 with interest at 8%pa and costs; and
(4) Perangsang Aluminium Sdn Bhd on 23 February 1990 for the sum of $437,174.70 and costs.

Before the appeal of the garnishee against the decision of the SAR in granting the garnishee order absolute on 27 August 1990 could be heard, the judgment creditor obtained a writ of seizure and sale dated 10 September 1990. Steps were taken by the judgment creditor to execute the said writ of seizure to attach the property of the garnishee. Under the circumstances, the garnishee had no choice but to pay up the full sum as mentioned in the said garnishee order absolute to the judgment creditor as the judgment creditor would not uplift the attachment unless the said payment was made. The garnishee therefore made out a cheque for the full sum in the name of the SAR and lodged the same in court.

In their appeal, the garnishee raised three essential grounds in support of their contention that the SAR was wrong to grant the garnishee order absolute dated 27 August 1990 and the three grounds are:

(1) as the grant of the garnishment order of 27 August 1990 was in violation of the Mareva injunction issued earlier the SAR therefore had no jurisdiction to grant such an order;

(2) furthermore as there was a winding-up proceeding pending at the time the garnishment was made absolute the SAR acted in violation of s 224 of the Companies Act 1965; and

(3) the garnishee order absolute was issued contrary to O 49 r 6(1) read with O 51A of the RHC as there were at the material time other creditors of the judgment debtor who had already been issued with garnishee orders absolute. Under the circumstances there should be a rateable distribution of the moneys due to the judgment debtor amongst the several creditors.

In considering ground (1), it is clear that the Mareva injunction merely restrained the defendant (the judgment debtor in this garnishee proceeding), their agents or servants from disposing of or dealing with any moneys received and/or due and owing to the defendant from Syarikat Telekom Malaysia (the garnishee in this garnishee proceeding). It does not to my mind prevent the judgment creditor from resorting to O 49 r 1 of the RHC to garnish the amount of the debts due to Resilient from Syarikat Telekom Malaysia simply because the provisions of the said order specifically permits a judgment creditor, who has obtained a judgment for the payment of money by a judgment debtor, to obtain an order from the court to direct a third party who at the material time is indebted to the judgment debtor to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from that third person. In short, the remedy under the said O 49 is to enable the judgment creditor to attach any moneys owed by the garnishee to a judgment debtor in order to satisfy the judgment debt or part thereof owed by the judgment debtor from the moneys due to the judgment debtor from the garnishee. The judgment debtor suggested that in garnishing the moneys due to them from the garnishee, the judgment creditor was in fact stepping into the shoes of the judgment debtor and as such the mareva injunction restraining the judgment debtor from receiving payment from the garnishee should apply equally to the garnishor. Furthermore, so said the judgment debtor, the garnishee on whom the injunction had been served is bound to obey the injunction order. Such a suggestion is best stated and be rejected simply because a careful reading of the injunction will show that it did not restrain Resilient, the defendant in the civil suit CS 22–377–87, from receiving the moneys due to them or owing to them from Syarikat Telekom Malaysia. What the injunction said was that the defendants whether by themselves, their agents and/or servants were restrained from '*disposing off or dealing* with any of the moneys received and/or due to and owing to the defendant from Syarikat Telekom Malaysia Bhd.' From the above statement made in the injunction, it cannot conclusively be construed that the defendant is prevented from receiving the moneys owed to them from the said Syarikat, should the latter choose to release the moneys to them but the defendant could not on receipt of the moneys dispose them off or deal with them in a manner detrimental to the plaintiff's claim in that suit. The aforesaid propositions are reinforced by the fact that there is nothing in the injunction to restrain the said Syarikat from releasing the moneys even to the defendant. But as a matter of caution, the said Syarikat would certainly be unwilling to do so because

should they do so and *if and only if the defendant upon receipt of the moneys disposed of them to the detriment of the plaintiff's claim* the Syarikat might very well be charged with aiding and abetting the defendant in violating the injunction and interfering with the course of justice. If the proposition that the injunction did not restrain the said Syarikat from releasing the moneys even to the defendant in that suit is accepted (which I say that it should), how can it be said that the injunction would prevent the judgment creditor in this suit from garnishing the moneys owed by the garnishee to the judgment debtor? By the same token how can it be said that the garnishee is bound by the injunction not to release the moneys owed by the judgment debtor to the judgment creditor in the present case? The answer must definitely be in the negative bearing in mind that an injunction being basically a remedy in equity, it acts only in personam. The ordinary rule therefore is that only the persons named in the injunctive order and who are in breach of the said order can be charged for contempt of court (see the passage from the judgment of Buckley LJ appearing at p 974C of the case of *Cretanor Maritime Co Ltd v Irish Marine Management Ltd*[1]).

It is true that any other person not so named but who assisted the person so named to breach the injunction can also be charged for contempt of court. However that other person is charged not on the ground that he is in breach of the injunction but rather on the ground that his act amounts to an act of interfering with the course of justice. This distinction is important in that in making the garnishee order absolute and directing the garnishee to pay the moneys of the judgment debtor to the judgment creditor, the SAR was merely exercising the power conferred on the court by O 49 r 1 of the RHC. The question of the SAR or the judgment creditor having acted in contempt of court does not therefore arise at all. Finally, it must be borne in mind that a Mareva injunction is not granted to improve the position of the plaintiff as against other debtors by giving him priority over the assets of the defendant nor to prevent him from paying debts as they fell (see *PCW (Undertaking Agencies) Ltd v Dixon*[2]).

Turning to ground (2) asserted by the garnishee which I have adumbrated earlier, it is appropriate to state that the second garnishee order to show cause was granted on 18 May 1989. The hearing of the show cause order before the SAR commenced on 10 July 1989 and lasted over one year. This lengthy hearing was due to a number of factors such as delay in filing affidavits, the need on the part of the judgment debtor to call witnesses to give oral evidence to establish the exact sum of money due and owing to the judgment debtor which was still being retained by the garnishee since the main and only contention of the garnishee at that time was that there was no more money due and owing from the garnishee to the judgment debtor, and the delay in making submissions at the close of the trial. As stated earlier, it was not until 27 August 1990 was the SAR able to grant the garnishee order absolute. Thereafter on 29 August 1990 the garnishee filed their notice of appeal. However the judgment creditor submitted that a letter of demand dated 5 September 1990 was sent to the garnishee's legal adviser with a copy to their solicitors requesting payment according to the order absolute on or before 10 September 1990 failing

which the judgment creditor would take steps to pursue with a writ of seizure and sale. As there was no response from the garnishee, the judgment creditor accordingly carried out execution proceedings by way of a writ of seizure and sale on 11 September 1990. Accordingly, the properties of the garnishee were duly attached. The garnishee had no choice but to pay the garnished sum of $435,656.45 to the court in the name of the senior assistant registrar on 12 September 1990 to effect lifting of the attachment. Thereafter the garnishee applied to this court for a stay order in which they requested that the sum of $435,656.45 paid into court should continue to be retained by the court pending the disposal of their appeal. Their application for a stay order was made on 12 September 1990 (encl 53). The application for a stay order was supported by an affidavit affirmed by Sallehuddin on 11 September 1990. Two important issues were raised in the said affidavit namely (i) winding-up proceedings against the judgment debtor had been commenced and (ii) various other creditors of the judgment debtor had also obtained garnishee orders absolute against the garnishee. Under the circumstances it was therefore averred that the garnishee had to seek directions from the court as to (i) how the moneys retained by the garnishee should be distributed to the various creditors and (ii) whether in view of the winding-up proceedings having been commenced, it would not be contrary to the provisions of the Companies Act 1965 to make payments to the various creditors. According to counsel for the judgment debtor, the winding-up petition was filed by the liquidator of Markcon at the High Court Johore Bahru on 31 March 1990. From the affidavit of Sallehuddin dated 11 September 1990, the garnishee's solicitors had been informed by the liquidators of Markcon about the presentation of the said winding-up petition (see exh ST–1 annexed to the said affidavit). Yet this matter was never brought to the notice of the SAR at the hearing of the order to show cause. However that may be, the said winding-up petition registered by the High Court at Johore Bahru as winding-up petition No 28–5–90 was set aside by LC Vohrah J on 10 December 1990.

Based on the above facts which are not in dispute, my findings are as follows:

In the first place, at the time of service upon a garnishee of an order to show cause all such property of the judgment debtor as therein mentioned is being attached in the hands of the garnishee to answer the order to show cause. In other words, the attachment of the property of the judgment debtor has already been effected and the garnishee is asked to appear at the hearing of the order to show cause to explain if he can, 'why he should not pay to the person who has obtained such judgment or order' the debt due from him or so much thereof as may be sufficient to satisfy the judgment or order (per judgment of Chitty J in the case of *Re Greer*[3]). In citing the judgment of Chitty J, I have not overlooked the fact that in making this proposition, his Lordship was giving an exposition of the effect of the provisions of O 45 r 1 of the pre–1963 English Supreme Court Rules which was in pari materia with O 45 r 1 of our old Rules of High Court 1957. However that may be, it is to be noted that under O 49 r 2 of our new Rules of High Court 1980 the same provision has been provided where it says:

> An order under this rule shall in the first instance be an order to show cause, specifying the time and place for *further consideration of the matter and in the meantime attaching such debt as is mentioned in para (1) or so much thereof as may be specified in the order to answer the judgment or order* mentioned in that paragraph and the costs of the garnishee proceedings. (Emphasis supplied.)

From the clear wordings of O 49 r 2 there can be no dispute that upon the issue and the service of the order to show cause on the garnishee, the attachment of the property of the judgment debtor has been affected and the garnishee is asked to appear only to show cause as to why he should not release the debt to the judgment creditor. It is no doubt true to say that an attachment put in force after the commencement of winding-up is void pursuant to s 224 of the Companies Act 1965 — a corollary if the attachment is effected before the commencement of the winding-up, the attachment cannot be affected by s 224 of the said Act. An appropriate commentary on this issue is made by Macpherson in his book, *The Law of Companies and Liquidation* (2nd Ed) p 170 where it is said:

> The term 'attachment' is apt to describe the process by which a judgment creditor obtains a garnishee order attaching a debt which is owing by some third party to the debtor company. An attachment put in force after the commencement of winding up is void, and a garnishee order is put in force not when the order nisi is obtained, but only when it is served on the garnishee, since it is then that the garnishor acquires the status of a secured creditor. However, if service is effected before the commencement of winding up, the attachment is not affected by s 228 and, were it not for the prohibition against dispositions of company property imposed by s 227(1), the creditor might be entitled to retain a payment made to him by the garnishee even after winding up had commenced.

It should be borne in mind that ss 228 and 227(1) of the English Companies Act are substantially similar to ss 224 and 223 respectively of our Companies Act 1965 (see also O 49 r 3(2) of RHC). In my judgment in the case of *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd & Anor*,[4] I cited a passage [at p 580] from the speech of Connoly J in *Re Barrier Reef Finance & Land Pty Ltd*[5] where his Lordship said at p 830: 'From the commencement of the winding up of the company in this case it was no longer really the owner of its own property.' By this statement his Lordship went on to say that the property of the company is held in trust for the whole of its creditors for equal division.

Applying the aforesaid principle to the present case, s 224 of the Companies Act 1965 cannot apply to render void the garnishee order absolute made on 27 August 1990 simply because the attachment of the judgment debtor's money was effected prior to the presentation of the winding-up petition. Furthermore when the garnishee having failed to show cause to the satisfaction of the SAR resulting in the said order being made absolute, they went on to pay the garnished sum in order to have the attachment of their property uplifted. Having done so they are now precluded from challenging the validity of the garnishee order absolute granted on 27 August 1990 — see the Supreme Court Practice (1979 Ed) Vol 1 p 769 para 49/1/16. In any event, the winding-up petition had been set aside on 10 December 1990. Such a setting aside must relate back to the date when the said petition was presented on 31 March 1990. Hence it is futile to

suggest at the hearing of the appeal by this court that the SAR had no jurisdiction to grant the garnishee order absolute on the ground that s 224 of the Companies Act 1965 prohibits such an order to be made.

Now to ground (3). It is to be noted that this ground was never raised at the hearing before the SAR. The sole contention raised before the SAR was that as there were already three garnishee orders absolute made against the garnishee, there was no more funds of the judgment debtor left for the judgment creditor to garnish pursuant to the second garnishee order to show cause. It was only when the garnishee applied for a stay order on 12 September 1990 did they suggest that directions would have to be sought from this court as to how the moneys of the judgment debtor still retained by the garnishee should be distributed to the six creditors (inclusive of the judgment creditor in the present case) who had been granted garnishee orders absolute. Be that as it may, this issue has now become academic as the project architect after having been threatened with a law suit should he fail to produce the statement of final account, had finally with the consent of the garnishee supplied the solicitor of the judgment creditor with the said statement of final account (see exh WKL-4 annexed to the affidavit of Wong Kim Lin affirmed on 14 November 1991 encl 78) certifying that the amount due to the judgment debtor which no doubt is still being retained by the garnishee is $1,417,993.05. That being the case, it would appear that the garnishee has sufficient funds to pay all the six creditors/garnishors particularly when the garnishee has not filed any affidavit to state otherwise.

In any event, it is my considered opinion that O 51A is not applicable to garnishee proceedings simply because a garnishor can only obtain a garnishee order against a garnishee if and only if the latter was in possession of funds due to the judgment debtor sufficient to satisfy the judgment debt of the judgment creditor. The question of rateable distribution therefore cannot arise. Likewise, O 49 r 6 is equally inapplicable to the present case since the other creditors had obtained a garnishee order absolute which would not have been issued if the garnishee was able to satisfy the court that there was no funds or no sufficient funds to satisfy the garnishment order. More importantly, there is no evidence to show that there was some other person other than the six creditors mentioned earlier who could be said to be entitled to or who had made a claim in respect of the moneys of the judgment debtor at present held by the garnishee.

For the above reasons the appeal of the garnishee dated 2 August 1990 is dismissed with costs to be paid by the garnishee to the judgment creditor as well as to the intervenor.

Appeal dismissed.

Reported by PS Ranjan